IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-568

OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA, a Corporation,
Petitioner,

LHI-688 EMPLOYEES RETIREMENT AND PENSION PLAN TRUST: PHILIP L. GOODWILLING: LEVI SANFORD; ERNST NEIDEL; PAUL AKERS; RONALD GAMACHE; MICHAEL DUNN; KENNETH CARROLL; JAMES JOINER; CHICK THORNTON; and JOHN BECKER,

VS.

CHARLES SAFFO, RICHARD KAVNER and HAROLD J. GIBBONS,
Respondents.

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents, Charles Saffo, Richard Kavner and Harold J. Gibbons, pray that the Petition of Occidental Life Insurance Company of California for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit be denied.

RESPONDENTS' COUNTER-STATEMENT OF THE CASE

Factual Background

On March 18, 1971, Petitioner entered into a "Group Annuity Contract" with "The Trustees of the LHI-688 Employees

Retirement and Pension Plan Trust." "LHI" stands for the St. Louis Labor Health Institute and "688" is short for Warehouse and Distributors Workers Union, Local 688 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. These are separate entities, with separate pension plans ("Plan A" and "Plan B"). The 688 plan provided higher benefit levels, and the Contract required higher contributions, for 688 employees than for LHI employees. The 688 plan provided for monthly pensions calculated at $40 times years of credited service.

On November 3, 1971, April 10, 1972, and April 10, 1973, Occidental reported to the Trustees that "[t]he Plan is actuarially sound." These reports showed the contributions for the two plans as one lump sum, and stated the "actuarial liability" in terms of the total liability of both plans to their respective beneficiaries.

On November 29, 1973, after all three Respondents herein had retired and begun collecting their pensions, the Trustees voted to submit Amendment 2 to the IRS for approval. This amendment, which applied only to the 688 Plan, added early vesting and early retirement, increased the break-in-service period, and reduced the number of years of service required for normal retirement. Occidental informed the Trustees that these "improvements" would substantially increase the actuarial liability. In order to "pay" for the "cost" of these "improvements," Amendment 2 reduced credit for *future* years of service from $40 per year to $20 per year.

Respondents' actuarial report for 1973, which stated that "[t]he Plan" was actuarially sound before and after amendment, was included in the submission to IRS. The agent who was assigned to this submission asked for the actuarial data as to the 688 contributions and liability. The figures submitted by Occidental indicated a shortfall of contributions on the 688 plan of over one million dollars. The agent "noted" that these figures indicated that the 688 plan was not actuarially sound.

Because three of the four employees who had already retired "were Union officers," the IRS rejected the proposed amendment as "discriminatory." On June 12, 1975, the Trustees adopted Amendment No. 4. This Amendment included the "improvements" contained in Amendment 2, and reduced *all* pension credits, past and future, to $20.55 per year of credited service. Thereafter, the Trustees and Occidental reduced the pension of Respondent Gibbons from $1200.00 per month to $361.05 per month, and that of Respondent Saffo from $800.00 per month to $296.04. Saffo had never been an officer of the Union.

Section 3.7 of the contract between Petitioner Occidental and the Trustees provides:

> "If the conditions of the contract are met, or if Discontinuance of the Contract occurs after the conditions of the Contract have been met for the first twenty-five Contract Years, Occidental agrees to provide and guarantee all benefits which shall become payable under the Plan with respect to those Participants who are listed in the Schedule of Participants attached to the Contract as Exhibit B . . . ."

Joint Appendix 448-49, attached hereto as Appendix pp. 1-2. Exhibit B includes all 688 employees as of the date of the Contract. Joint Appendix 457, attached hereto as Appendix p. 3.

Petitioner Occidental has claimed that "the conditions of the contract" were not "met" because the Contract permits them to use LHI contributions to pay 688 benefits, and the Trustees instructed them not to do so. Under the heading of "Factual Background" in its Petition, Occidental represents to this Court that the legal issues it presents are to be considered in the light of the following "facts":

> "[T]he trustees held discussions with Occidental . . . . as to providing increased benefits for Local 688 employees

through funding Plan A and Plan B on a "pooled" basis under which the two plans would be treated as one with the result that contributions from LHI as well as those from Local 688 could be utilized to support benefits for Local 688 employees. Occidental prepared and submitted to the trustees proposed schedules of contribution and benefit levels based on this "pooling" concept. Occidental advised the trustees that if Plans A and B could not be "pooled," the substantially increased benefits which the trustees wanted for Local 688 employees could not be provided without significantly increased contributions from Local 688 to support such benefits.

" . . . .

"The 1971 'pooled' pension plan ('LHI-688 Plan') was never actuarially unsound when considered on the 'pooled' funding basis intended and agreed upon by the Trustees and Occidental."

Petition 4-5

In all of the correspondence which preceded the contract, no mention was made of "pooling." Occidental never submitted a proposal indicating that LHI contributions would be used to fund 688 benefits (or vice versa). In fact, the first time the concept of "pooling" ever surfaced in any document was in Occidental's answer in this lawsuit.

Petitioner Occidental's employees did testify that "pooling" was discussed. Respondents' witnesses testified that it was not (T. 102-103, 654, Joint Appendix 65, 433, attached hereto as Appendix pp. 4-5). Petitioner submitted several proposed Findings of Fact and one proposed Conclusion of Law to the effect that the Trustees had suggested "pooling" and agreed that LHI contributions could be used to pay 688 benefits (Proposed Findings of Fact and Conclusions of Law Submitted by Defendant Occidental Life Insurance Company of California in March,

1978, Pursuant to Court's Order ¶¶17-18, 22-24, 28, IX, pp. 4-6, 25, attached hereto as Appendix pp. 6-9). The district judge, sitting without a jury, rejected these proposed findings and the proposed conclusion.

The Court of Appeals "agree[d] with the trial court that the evidence does not support" Occidental's "contention" "that both LHI and Local 688 contributions were to be used as a common fund to support all pension benefits under either Plans A or B." Petition 16a. As the Court of Appeals carefully analyzed the evidence, Occidental's own actuarial calculations demonstrated that there were no "excess LHI contributions to, in effect, subsidize Local 688 benefits." Petition 17a-18a. And, of course, the trial court's determinations based on credibility were binding on appeal.

In short, Occidental has presented to this Court as "fact" a contention which was specifically determined to the contrary below. Petitioner bases a substantial portion of its Reasons for Allowance of the Writ and Argument on this supposed "fact" that the parties had agreed on "pooling." Petition 19-20 n.8, 27 n.13, 28-32, 29 n.14, 31-32 n.15.

Petitioner Occidental has created another significant "fact" which has no support in the reocord, and is contrary to the findings of the trial court, when it states that, when the Trustees passed Amendment No. 4 in 1975, they "believed that Local 688 could not afford to increase contributions." Petition 9. This supposed "fact" also does yeoman work in the "Reasons for Allowance" section of the Petition. Petition 19-20 n.8, 26. There is no evidence of this "fact." The trial court found otherwise: "It was not reasonable for [the Trustees] to divest plaintiffs of their pensions without first seeking to require the union to make sufficient contributions to pay the pensions in accordance with its agreement." Petition 40a.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

1. The Courts Below Did Not Judge Any of Respondents' Causes of Action By Inapplicable Legal Standards.

Occidental's Petition complains that the Court of Appeals affirmed "the District Court's holdings that Occidental was liable on theories of 'actuarial malpractice,' breach of contract to provide actuarial services, fraud, and breach of fiduciary duty. Though neither the Eighth Circuit nor the District Court explicitly held that state law governed these claims, it is clear that something other than federal law was applied. These state law causes of action having been pre-empted by Section 514 of ERISA, 29 U.S.C. §1144, liability premised on them cannot be sustained."

The District Court found that: "Amendment 2, if it had gone into effect, would have substantially reduced Occidental's liability on its guarantee. Occidental withheld this information from the Trustees." Petition 42a. Amendment 2 was adopted conditionally on November 29, 1973.

The District Court further found that:

> "15. In its actuarial reports to the Trustees, and in the valuation summary submitted to the IRS, Occidental showed its own liability of . . . ($1,067,000) on its guarantee as being part of plan B's unfunded actuarial liability. There is no evidence that Occidental ever informed either the Trustees or the IRS that its statement of plan B's unfunded actuarial liability included its own liability for the guarantee. Because they showed Occidental's liability as part of the fund's liability, the actuarial reports and valuation summary were misleading, deceptive and inaccurate . . . .
>
> "16. The misleading valuations shown on the valuation summary submitted to the IRS caused the district director

> of the IRS to question the actuarial soundness of plan B. This in turn caused the adoption of Amendment 4 which divested plaintiffs of their pensions."

Petition 41a. The actuarial reports referred to were submitted in 1971, 1972, 1973, and on March 6, 1974. The "valuation summary submitted to the IRS" was furnished to the Trustees on June 4, 1974.

Section 514(b)(1) of ERISA, 29 U.S.C. §1144(b)(1) provides: "This section shall not apply with respect to any cause of action which arose, or *any act or omission* which occurred, before January 1, 1975." (Emphasis added.).

Thus, ERISA did not apply to these claims, and did not preempt state law with regard thereto. But, even if federal law is applicable to these claims, Petitioner has not shown wherein either lower court applied any principles not in accord with federal law.

Petitioner also complains that the courts below relied upon state law in deciding Respondents' claims as third-party beneficiaries to the Contract between Occidental and the Trustees. Petitioner entirely fails to show where in its opinion the Eighth Circuit relied upon state law in concluding that Occidental had breached its contract.[1] If, as suggested by Petitioner, state law is preempted with respect to this claim, Petitioner cites no authority for the proposition that, under federal "common law," a party may breach its contracts with impunity. Respondent suggest that no such authority exists and that

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[1] The only proposition for which the Eighth Circuit cited state law was the rule that: "The retirees' pension rights were vested as they had complied with all conditions entitling them to participate in the plan and had begun to receive benefits under it." Petition 22a. Whether judged by Missouri law, pre-ERISA federal law, or ERISA, once an employee has retired and began receiving benefits, his rights were "vested."

the Eighth Circuit's opinion below with respect to holding Occidental liable for breach of contract is completely consistent with federal common law.

Yet another instance in which Petitioner claims the holding of the Court below violated the preemption provisions of ERISA relates to the scope of judicial review of the Trustees' action. Petitioner defends its reduction of Respondents' guaranteed benefits on the grounds that the Trustees ordered the reduction, which defense includes the question of the propriety of the Trustees' action. Petition 16. Petitioner claims that the Courts below refused to limit review of the Trustees' action in amending the plan to the question of whether their action was "arbitrary and capricious." Nowhere in either opinion did the Court state that its rejection of this standard was based upon state law. Petitioner then reasons that, if the applicable federal standard is "arbitrary and capricious," and if the Courts below did not use such a standard, then they must have been relying upon some law other than federal law—*i.e.*, state law.

The flaw in Petitioner's argument is that the cases cited by it do not support the assertion that, under federal law, the courts below should have limited their review of the Trustees' action to the question of whether the actions were arbitrary or capricious. Petitioner relies primarily upon *Riley* v. *MEBA Pension Trust,* 570 F.2d 406 (2nd Cir. 1977), where the issue was one of eligibility under the plan.

The Second Circuit noted the broad discretion granted by the MEBA plan to the Trustees with respect to questions of "coverage," "eligibility" and "construction" and correctly stated:

> "*When such a power has been conferred,* the judicial rule is limited to determining whether the Trustees; *interpretation* was made rationally and in good faith—not whether it was right." 570 F.2d at 410. (Emphasis added.).

This statement in *Riley* as to the limitation of judicial review is limited to questions of "interpretation." This limitation is derived from the plan's grant of broad discretion to the Trustees with respect to questions of interpretation and application.

Petitioner notes, quite correctly, that Section 9.1 of the LHI-688 Plan is similar to the grant of power in the plan in *Riley*. Importantly, the grant of discretion in the LHI-688 plan is limited to "matters arising in the administration, interpretation and application of the Plan . . . ."

The action of the Trustees on which Occidental bases its defense did not involve an area of "administration, interpretation [or] application" of the plan which was subject to the Trustees' exercise of discretion. In the instant case, the Trustees drastically amended the plan—a far cry from the simple administration or interpretation. The fact that Section 9.1 has no applicability to an amendment of the plan explains why, as noted by Petitioner, "[t]he majority below make no mention of this provision . . . . " Petition 18.

The other two cases cited by Petitioner are *Reiherzer* v. *Shannon,* 581 F.2d 1266 (7th Cir. 1978) and *Morgan* v. *Laborers Pension Trust Fund,* 433 F.Supp. 518 (N.D. Calif. 1977). To be sure, both of these cases hold that, under the facts presented therein, the scope of their review of trustee action is limited to whether those actions were "arbitrary and capricious." However, both of those cases involved questions of application or construction of trust terms to a beneficiary. The authority for applying this limitation on the Court's review depends upon the particular trust instrument's conferral of broad discretion with respect to matters of construction or application. Thus, in *Rehmar* v. *Smith,* 555 F.2d 1362 (9th Cir. 1976), a case involving construction of a pension trust, the Court, in explaining why judicial review was to be limited to the question of whether the trustees' actions were "arbitrary and capricious," stated:

> "To give meaning to the rights of beneficiaries involved in any fiduciary relationship, the courts have always found it necessary to subject the conduct of the fiduciaries to judicial review and correction. Where, however, the instrument defining the fiduciaries' duties gives them broad discretion, as is generally the case with welfare and pension trusts, the courts limit their review and intervene in the fiduciaries' decisions only where 'they have acted arbitrarily or capriciously toward one of the persons to whom their trust obligations run.' " (Citations omitted.).

555 F.2d at 1371. This language from *Rehmar* was quoted with approval in the case *Morgan* v. *Laborers Pension Trust Fund, supra,* cited by Petitioner.

Ironically, the only provision of the plan relating to the Trustees' power to amend it in the manner they purported to in 1975 is a *limitation* upon their power. Section 10.5 of the plan provides that:

> "[i]n no event may any amendment be made to the Plan which:
>
> " . . . .
>
> "(b) will divest any Participant of any benefit credited to him under the Plan before the effective date of the amendment except as the same may be required by the U.S. Internal Revenue Service as a condition of preserving the Trust's Federal tax exempt status."

Because the LHI-688 plan contains no grant of discretionary power with respect to the action of the Trustees in amending the plan, the statement in *Riley* as to the limitation of judicial review to a determination of whether the Trustees "interpretation was made rationally and in good faith" is inapplicable; when the express limitation contained in § 10.5 of the LHI-688

Plan is considered, Petitioner's contention that federal law required the Court below to limit review to a determination of whether the Trustee's action was "arbitrary or capricious" is unworthy of this Court's consideration.

2. **The Benefits Which the Decision Below Requires Occidental to Pay Are Not Discriminatory Because the Rationale of the Decision Will Require Occidental to Make Similar Payments to All Persons Who Were Employed By Local 688 When the Contract Was Signed.**

Reason No. 2 of Occidental's Petition incorrectly assumes that these Respondents will be the only Plan beneficiaries who will benefit from the decision below, and thereby assails the Eighth Circuit for causing discrimination which does not in fact exist:

> "The net effect of the decision of the Court of Appeals is to require Amendment 4 . . . . to be applied to reduce retirement benefits on a *prospective basis only,* thereby producing discrimination . . . .
>
> "In requiring the plan to discriminate in favor of former officers, the court below clearly violated not only . . . public policy against such discrimination . . . but also the coordinate principle . . . that vested interests may be retroactively reduced in order to avoid discrimination in favor of the prohibited group."

Petition 24-25.

The decision below does not "require Amendment 4 . . . to be applied" at all. As Occidental itself admits, Amendment 4 was, in part, a reaction to what was perceived by the Trustees as an "underfunding of the Local 688 portion of the plan." Petition 26. The District Court specifically found, and the Court of Appeals agreed, that "the Local 688 portion of the plan" was *not* underfunded because Occidental had agreed that, in con-

sideration of the "contributions" made by 688, it would "provide and guarantee" the pensions of *all persons* employed by 688 at the time of the contract. Petition 3a-4a, 11a-20a, 38a-39a, 41a-43a. Because of this guarantee, Occidental is required to pay any shortfall out of its own pocket.

Occidental reported to the IRS what was, in fact, its own liability, as a liability of the 688 Plan. This caused the local IRS agent to comment that the Plan appeared to be underfunded, which led to the Trustees' concern about underfunding, and the adoption of Amendment 4, which reduced retroactively the benefits of all 688 employees. Based upon expert actuarial testimony, the trial court made a specific finding that Amendment 4 relieved Occidental of $800,000 of its liability to the Plan participants under its guarantee. Petition 42a. The Court of Appeals agreed. Petition 19a-21a. Occidental failed to inform the Trustees that the reduction of benefits via Amendment 4 would benefit Occidental in the amount of $800,000. The Trial court found that the misleading actuarial report which was submitted to the IRS, the failure to inform the Trustees that the 688 Plan could not be underfunded because of the guarantee, and the failure to inform the Trustees that Amendment 4 would benefit Occidental by $800,000, constituted fraud, actuarial malpractice, breach of fiduciary duty, and breach of contract. Petition 42a-43a. The Court of Appeals agreed. Petition 20a-21a.

The effect of Occidental's wrongdoing was not limited to these Respondents. Exhibit B to the Contract, which lists the 688 employees whose pensions Occidental guaranteed, contains 47 names. Joint Appendix 457, attached hereto as Appendix p. 3. Every one of those 47 persons who is still an eligible participant in the Plan has a cause of action against Occidental for his or her full benefits, at the very least.

The Trustees are obligated actively to serve the interests of these participants against Occidental and, if necessary, the Union itself. The means they chose to employ to accomplish this

are, at least in the first instance, up to them. However, since Amendment 4 was adopted under the fraudulently induced misconception that the Plan was underfunded, it would seem that the first step would be to repeal Amendment 4. Of course, "ERISA required" "improvements" must be reenacted. The Trustees may also choose to readopt "other desired improvements to the plan." The decision below does not dictate whether "desired improvements" should be adopted, or how "ERISA required" "improvements" should be funded. All that the lower courts have said is that the Trustees may *not* fund "improvements" by taking away vested pension rights.

Thus, it is clear that, if the Trustees live up to their obligations to the other Plan beneficiaries, there will be no "discrimination." In order to find such "discrimination," this Court would have to overturn all of the findings below with regard to Occidental's "guarantee." The only grounds presented in the Petition for even considering this issue are advanced in Reason 3, and will be discussed next.

3. **The Decision Below Was Not Clearly Erroneous.**

The Third Question Presented for Review is: "Whether the decision below is clearly erroneous even under the incorrect state law standard applied by the Court of Appeals." Petition 3. Respondents do not believe that this question presents a "special and important reason" under SUP. CT. RULE 19 for the exercise of this Court's discretion. Nor does this appear to be a question "expressed in the terms and circumstances of the case" as envisioned by SUP. CT. RULE 23. Further, lest it be assumed that a significant legal issue lies buried beneath an ineptly phrased question, examination of the text of the third Reason for Granting the Writ reveals that this "Question" is exactly what it appears to be—a request that this Court disagree with the trial court's interpretation of the Contract, and accept Occidental's interpretation thereof, on the basis of parol evidence which was submitted by Petitioner and disputed by Respondent's witnesses.

As stated by Occidental, the question raised in the "Reason" is whether "the conditional guarantee contained in section 3.7 of its funding contract with the trustees was conditioned on, among other things, 'pooling' of plan contributions and liabilities for LHI and Local 688 employees." Petition 28-29.

In support of its defense that "pooling" was a condition of the Contract, Occidental offered the testimony of one witness who testified that "pooling" was suggested either by Respondent Kavner, or by an insurance broker who was a "dual agent" for the Trustees and Occidental, or by an actuary employed by that "dual agent." T. 351-58, Joint Appendix 236-41, attached hereto as Appendix pp. 10-15. Another witness testified for Occidental that he discussed "pooling" with an attorney for the Trustees. T. 180-82, 194-97, Joint Appendix 118-19, 127-29, attached hereto as Appendix pp. 16-20.

For Respondents, Kavner testified that the subject of "pooling" the contributions was never discussed in his presence. T. 102-103, Joint Appendix 65, attached hereto as Appendix p. 4. It was stipulated that the attorney referred to, if called, "would testify that he did not suggest 'pooling' to anyone" and did "not recall the word ever being used in conjunction with this plan or contract." T. 654, Joint Appendix 433, attached hereto as Appendix p. 5.

The only other "evidence" that "pooling" was a "condition of the contract" was an ambiguous "X" in a box labeled "Other" on a line for "Employer Contribution Formula" in one of the Trustees' Applications for Determination submitted to the IRS. Occidental Exh. Y-1, Joint Appendix 565, attached hereto as Appendix p. 21. On the same line of a later Application, the box labeled "All" was checked and box labeled "Other" was not. Occidental Exh. BB, Joint Appendix 571, attached hereto as Appendix p. 22. Neither the word "pooling," nor a descriptive equivalent thereof, appears in the Contract. None of the voluminous correspondence from Occidental to the

Trustees even mentions "pooling." To the contrary, Occidental wrote to the Trustees:

> "Our actuaries have stated that a benefit of $40.00 per month for each year of service up to minimum [sic] of 30 years can be provided by the following contributions:
>
> "Effective January 1, 1970—$22.00 per week
>
> "Effective January 1, 1971—$28.00 per week
>
> "Effective January 1, 1972—$34.00 per week
>
> "Effective January 1, 1973—$40.00 per week."

Plaintiffs' Exh. 11, Joint Appendix 463-64, attached hereto as Appendix pp. 23-24. This was the contribution level agreed upon in the final Contract, and the benefit level provided in the plan, for 688 employees. Thus, Occidental's own correspondence negates its claim that the parties agreed that LHI contributions would be used to pay 688 benefits. Other correspondence indicated that the LHI benefit levels agreed upon were the highest which could be paid based upon the LHI contribution rates. See Plaintiffs' Exh. 15, Joint Appendix 465-66, attached hereto as Appendix pp. 25-26.

Further, as the Court of Appeals set out in some detail, in the final Contract, the LHI employees received *higher* benefits at a *lower* contribution rate than the original proposal which Occidental admits was presented *before* it claims "pooling" was ever discussed. Petition 16a-18a. This shows that there was no "excess" in the LHI contributions which could have been used to fund 688 benefits.

Finally, Occidental's claim that "pooling" was a "condition of the guarantee" is circular because, if Occidental were allowed to use LHI contributions to pay 688 benefits, the "guarantee" would be meaningless. Under § 2.3 of the Contract, Occidental could require additional contributions to pay LHI pensions.

Joint Appendix 447, attached hereto as Appendix p. 27. If, as Occidental contends, the contract permitted Occidental to use LHI contributions to pay Exhibit B pensions, it could replenish the "fund" continuously with additional contributions to make up the deficit in the LHI funding, and the "guarantee" could never be effective. Thus, the parties could not have intended to allow Occidental to pay Exhibit B participants with LHI contributions.

Petitioner complains that the trial court "simply *ignored* whether 'pooling' was a condition of the guarantee and whether the plan was actuarially sound on a 'pooled' basis." Petition 29.[2] After trial, Petitioner submitted several proposed Findings of Fact, and one Conclusion of Law, regarding "pooling." See p. 4 *supra*. The trial court rejected these proposals. A finding of "non-pooling" was not an element of any of Respondents' causes of action, and Respondents are unaware of any rule which says that a trial judge must make negative Findings of Fact with regard to all of a losing party's contentions. [3]

Occidental makes no claim that either the District Court or the Court of Appeals applied incorrect legal principles in determining whether "pooling" was a condition of the contract. This is not a question which calls for review by this Court.

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[2] Petitioner quotes the dissenting opinion below for the proposition that: " 'It is undisputed that the LHI-688 Plan was never actuarially unsound when considered as a pooled fund.' " Petition 31. The dissent was mistaken. Respondents' actuary testified that, absent the guaranty, even on a "pooled" basis, the Plan, at its inception, was not actuarially sound. Joint Appendix 173-74, T. 236-64, attached hereto as Appendix pp. 28-29.

[3] Petitioner states that: "Throughout this case, Occidental has consistently maintained that . . . the conditional guarantee contained in section 3.7 of its funding contract with the Trustees was conditioned on . . . 'pooling' . . ." Petition 28. However, although Occidental set forth seven specific defenses in its Answer, "pooling" was not mentioned. Occidental's Answer to Amended Petition, attached hereto as Appendix pp. 30-33.

4. The Opinions Below Are Not Contrary to ERISA, the Internal Revenue Code, or Generally Accepted Accounting Principles.

As it has done in its first two Reasons for Granting the Writ, Petitioner has accused the lower courts of saying something which they did not say, and then vigorously attacked a non-existent holding. Petitioner's "straw man" is erected in the very first sentence under the heading of Reason 4: "The decision below holds Occidental liable on the novel theory of 'actuarial malpractice,' as well as on grounds of breach of contract to provide actuarial services, fraud, and breach of fiduciary duty for not assigning and disclosing to the plan trustees and reporting to the IRS the alleged 'value' of its conditional contractual guarantee." Petition 32. The Court of Appeals had a very simple answer to this argument: "Occidental also argues that it would be improper, under 26 U.S.C. § 412(c)(2), for it to include the $1,067,000 as a pension plan asset. Insofar as the trial court did not require it to do so, we need not decide the issue. Louis Prange [Respondents' actuarial expert] suggested several alternative methods of disclosing the value of the guarantee." Petition 20a n.17

In reporting to the IRS that the 688 pension plan had an "unfunded actuarial liability" in excess of one million dollars, Occidental led the IRS to believe that, despite 688's contributions at the agreed-upon rate, the beneficiaries would not receive their pensions. Occidental's report did not tell the IRS that, as long as Occidental was a solvent corporation, if 688 continued to make the agreed-upon contributions, the beneficiaries would be paid under Occidental's guarantee. By whatever standard it is viewed, Occidental's report was misleading.

Respondents' expert witness testified to the impropriety of Occidental's 1974 actuarial report. Occidental's argument that this report was proper is based upon a *proposed* Treasury regulation published in 1978. The applicability of this proposed

regulation is so obsure that Occidental did not even present it to the trial court. Occidental now seeks to have this court convict the trial court of error in accepting expert actuarial testimony as opposed to a *proposed* regulation which was not even cited to it.

This issue is not a proper subject for consideration for this Court because it will not affect the result below. It has no bearing on Occidental's liability to Respondents under its guaranty. It does not change the fact that Occidental stood to lose over $1,000,000 on its guarantee, nor the fact that Amendment 4 reduced this potential liability by $800,000, nor the fact that Occidental was guilty of fraud, breach of contract, actuarial malpractice, and breach of fiduciary duty for failing to inform the Trustees of the benefit which Amendment 4 would confer on Occidental. In other words, a decision that Occidental's report which was presented to the IRS was technically correct would not affect Occidental's liability one whit.

Finally, Respondents' Brief in the Eighth Circuit set forth several pages of analysis as to why the 1974 report could not be justified ever under the proposed regulations promulgated in 1978. Though repetition of such a detailed analysis would be appropriate for a brief on the merits, Respondents do not believe that it would assist this Court in reaching a decision on the granting of the writ.

CONCLUSION

Occidental was found guilty of breach of contract, fraud, actuarial malpractice, and breach of fiduciary duty under general principles of law which are accepted in both federal and state courts. Many beneficiaries other than Respondents will have similar causes of action, and will benefit from the judgment below. Nothing in the trial court's factual findings could possibly justify the grant of certiorari for this Court to review the record to see whether such findings were "clearly erroneous," or whether they are contrary to a proposed IRS regulation. The Petition should be denied.

Respectfully submitted,
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